

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL MARQUES; CRISTINA ROBLES,

## Plaintiffs,

V.

FEDERAL HOME LOAN MORTGAGE CORPORATION; BANK OF AMERICA, NATIONAL ASSOCIATION, successor by merger to BAC Home Loan Servicing LP f/k/a Countrywide Home Loans Servicing, LP; DOES 1 THROUGH 10, inclusive; APG FUND I, LLC.

## Defendants.

CASE NO. 12cv1873 - IEG (MDD)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT FEDERAL HOME  
LOAN MORTGAGE  
CORPORATION'S MOTION TO  
DISMISS FOR FAILURE TO  
STATE A CLAIM**

[Doc. No. 5]

Presently before the Court is Defendant Federal Home Loan Mortgage Corporation’s (“Freddie Mac”) motion to dismiss Plaintiffs’ first amended complaint (“FAC”) for failure to state a claim. [Doc. No. 5, Def.’s Mot. to Dismiss (“Def.’s Mot.”).] For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

## BACKGROUND

On July 30, 2012, Plaintiffs filed an initial complaint against Freddie Mac, BANA, and Does 1 through 10. [Doc. No. 1, Compl.] Plaintiffs filed their FAC on August 16, 2012 and added Defendant APG Fund. [Doc. No. 3, FAC.] In their FAC, Plaintiffs allege eight causes of action: (1) declaratory relief; (2) declaratory relief; (3) negligence; (4) quasi-contract; (5) violation of 15 U.S.C. § 1692, et seq.; (6) violation of California Business and Professions Code § 17200, et seq.;

1 (7) accounting; and (8) quiet title. [Id.] On September 14, 2012, Defendant Freddie Mac filed the  
 2 present motion seeking to dismiss Plaintiffs' FAC. [Doc. No. 5, Def.'s Mot.] Plaintiffs allege the  
 3 following facts in their FAC.

4 On or about January 6, 2004, Plaintiffs Michael Marques and Cristina Robles (collectively  
 5 "Plaintiffs") obtained title to real property commonly known as 172 Whitney Street, Chula Vista,  
 6 California ("the Property") by grant deed. [Doc. No. 3, First Amended Verified Complaint  
 7 ("FAC") ¶¶ 7, 29; Doc. No. 3-1, Ex. A, Grant Deed.] On or about September 6, 2006, Plaintiffs  
 8 executed a Mortgage Note ("Note") and a Deed of Trust in favor of First Magnus Financial  
 9 Corporation ("First Magnus") to borrow \$376,000 to finance the Property. [Id. ¶ 30; Doc. No. 5-1,  
 10 Def.'s Mot. at 1.] The Deed of Trust named Mortgage Electronic Registration Systems ("MERS")  
 11 as the nominee for First Magnus and as the beneficiary of the Deed of Trust to secure the loan  
 12 against the Property. [Doc. No. 3-2, Ex. B, Deed of Trust.]

13 Plaintiffs then allege that First Magnus attempted to securitize and/or sell their loan. It is  
 14 difficult to discern from Plaintiffs' FAC exactly what they are alleging occurred during the  
 15 securitization process. Plaintiffs allege that there is an "Unknown Trust," which is "the entity that  
 16 purports to hold the MBS [mortgage backed security ("MBS")] and thus purports to own the  
 17 Note." [Doc. No. 3, FAC ¶¶ 21, 31.] Plaintiffs allege that neither the promissory note nor the  
 18 deed of trust were validly transferred to the Unknown Trust "due to the failure to follow the basic  
 19 legal requirements for the transfer of a negotiable instrument." [Id. ¶¶ 21-22.] Plaintiffs argue that  
 20 consequently, "Defendants are merely third-party strangers to the loan transaction." [Id. ¶ 32.]

21 Plaintiffs state that Freddie Mac "is either the trustee of a [MBS] established pursuant to  
 22 the laws of the state of New York [or] claims to own the relevant MBS that Defendants claim  
 23 contains the Mortgage Note that is the subject of this cause of action." [Id. ¶ 9.] Plaintiffs state  
 24 that they "are ignorant as to the method the Defendant Freddie Mac claims to own an interest in  
 25 the subject Mortgage Note." [Id.]

26 Defendant Freddie Mac argues in its motion to dismiss that subsequently, an assignment  
 27 transferred the Deed of Trust from MERS to Defendant Bank of America, National Association  
 28 ("BANA") on January 24, 2012, and that the assignment was recorded on February 2, 2012. [Doc.

1 No. 5-1, Def.'s Mot. at 1.] Freddie Mac also argues in its motion to dismiss that Quality Loan  
 2 Service Corporation became the record trustee under the Deed of Trust. [Id.]<sup>1</sup>

3 Plaintiffs, however, allege that “no recorded assignment of the original Deed of Trust was  
 4 executed before the closing date of the trust.” [Doc. No. 3, FAC ¶ 34.] They claim that the  
 5 assignment of January 24, 2012 by MERS in favor of BANA was both untimely and invalid  
 6 because it was executed after the closing date of the Unknown Trust, which violates the Pooling  
 7 and Servicing Agreement (“PSA”). [Id.] Plaintiffs also contend that the assignment was invalid  
 8 because it was fraudulently executed by Jeanine Abramoff, who Plaintiffs claim “lacked the  
 9 requisite corporate and legal authority to effect an actual ‘assignment’ of the Mortgage Note and  
 10 Deed of Trust. [Id. ¶¶ 34, 48.]

11 Plaintiffs further allege that First Magnus declared bankruptcy on August 21, 2007. [Id. ¶  
 12 35.] Because they contend that the assignment to BANA was fraudulent, Plaintiffs argue that the  
 13 Mortgage Note and Deed of Trust “became subject to the jurisdiction of the Bankruptcy Trustee  
 14 and the Bankruptcy Court.” [Id.] Plaintiffs also argue that the Bankruptcy Trustee did not  
 15 authorize the January 24, 2012 assignment of the Deed of Trust. [Id. ¶ 38.]

16 Plaintiffs allege that on April 11, 2012, BANA caused to be recorded and sent to Plaintiffs  
 17 a Notice of Default and Election to Sell Under Deed of Trust. [Id. ¶ 89.] In July 2012, Plaintiffs  
 18 allege that BANA, on behalf of Freddie Mac, caused BANA’s agent Quality Loan Service  
 19 Corporation to send to Plaintiffs an undated and unsigned Notice of Trustee Sale to notify  
 20 Plaintiffs that the Property would be sold on August 10, 2012. [Id.; Doc. No. 3-5, Ex. E, Notice of  
 21 Trustee Sale.] On August 10, 2012, Quality Loan Service Corporation conducted a trustee’s sale  
 22

23       <sup>1</sup> Freddie Mac requests that the Court take judicial notice of six documents: (1) a deed of trust;  
 24 (2) an assignment of the deed of trust; (3) a substitution of trustee; (4) a notice of default; (5) a notice  
 25 of sale; and (6) a trustee’s deed upon sale. [Doc. No. 5-2, Request for Judicial Notice.] Plaintiffs  
 26 request that the Court take judicial notice of a Notice of Pending Action - Lis Pendens. [Doc. No. 6-1,  
 27 Request for Judicial Notice.]

Courts may take judicial notice of “a fact that is not subject to reasonable dispute because it:  
 28 (1) is generally known within the trial court’s jurisdiction; or (2) can be accurately and readily  
 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201.  
 Courts may take judicial notice of documents that are matters of public record or are quasi-public  
 documents. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). Because all of these  
 documents have been recorded in the San Diego County Recorder’s Office and are thus publicly  
 available, the Court **GRANTS** Freddie Mac’s and Plaintiffs’ requests for judicial notice.

1 and sold the Property to Defendant APG Fund I, LLC (“APG Fund”). [Doc. No. 3, FAC, ¶ 89.]

2 Plaintiffs allege that any actions by BANA to collect mortgage payments from Plaintiffs  
 3 and then to undertake a non-judicial foreclosure and sell the Property are unlawful because the  
 4 assignment of the deed of trust was invalid. [Id. ¶¶ 61, 89.] Plaintiffs also allege that “Defendants  
 5 failed to properly credit payments made, incorrectly calculated interest on the accounts, and failed  
 6 to accurately debit fees, as these payments belonged to the true beneficiary of the Note and Deed  
 7 of Trust.” [Id. ¶ 95.]

8 **DISCUSSION**

9 **I. Motion to Dismiss**

10 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests  
 11 the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v.  
 12 Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pleaded in  
 13 the complaint as true, and must construe them and draw all reasonable inferences from them in  
 14 favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th  
 15 Cir.1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual  
 16 allegations, rather, it must plead “enough facts to state a claim to relief that is plausible on its  
 17 face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility  
 18 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that  
 19 the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
 20 (citing Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent  
 21 with’ a defendant’s liability, it stops short of the line between possibility and plausibility of  
 22 entitlement to relief.” Iqbal, 556 U.S. at 1949 (quoting Twombly, 550 U.S. at 678).

23 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires  
 24 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
 25 will not do.” Twombly, 550 U.S. at 555 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986))  
 26 (alteration in original). A court need not accept “legal conclusions” as true. Iqbal, 556 U.S. at  
 27 678. Despite the deference the court must pay to the plaintiff’s allegations, it is not proper for the  
 28 court to assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that

1 defendants have violated the . . . laws in ways that have not been alleged.” Associated Gen.  
 2 Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).

3 Further, a court generally may not consider materials beyond the pleadings when ruling on  
 4 a Rule 12(b)(6) motion. United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003). However,  
 5 a court “may take judicial notice of matters of public record . . . as long as the facts noticed are not  
 6 subject to reasonable dispute.” Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9  
 7 (9th Cir. 2012).

8 As a general rule, a court freely grants leave to amend a complaint which has been  
 9 dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when “the court  
 10 determines that the allegation of other facts consistent with the challenged pleading could not  
 11 possibly cure the deficiency.” Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393,  
 12 1401 (9th Cir. 1986).

13 Defendant Freddie Mac first presents three reasons why the entirety of Plaintiffs’ FAC  
 14 must be dismissed. [Doc. No. 5-1, Def.’s Mot. at 9-14.] Freddie Mac then addresses Plaintiffs’  
 15 first and third through eighth causes of action and presents reasons why they should be dismissed.  
 16 [Id. at 15-21.] The Court addresses each reason in turn.

#### 17       A.     **Compliance with Minimal Pleading Standards**

18 Defendant Freddie Mac first argues that Plaintiffs’ FAC must be dismissed because it “is  
 19 devoid of specific factual allegations that Freddie Mac held itself out as the holder of the  
 20 [promissory] note.” [Doc. No. 5-1, Def.’s Mot. at 10.] However, Freddie Mac does not explain  
 21 why the entire FAC must be dismissed because of this purported failure to plead. Therefore, the  
 22 Court declines to dismiss the entirety of Plaintiffs’ FAC on this ground.

#### 23       B.     **Tender**

24 Defendant Freddie Mac also argues that Plaintiffs’ FAC should be dismissed in its entirety  
 25 due to Plaintiffs’ failure “to allege actual tender.” [Doc. No. 5-1, Def.’s Mot. at 11.] Plaintiffs in  
 26 their complaint state that they “have offered to and are ready, willing, and able to unconditionally  
 27 tender their obligation, although there is no requirement to do so.” [Doc. No. 3, FAC ¶ 106.]  
 28 Plaintiffs argue that they are “only required to allege a credible offer of tender, not actually

1 tender.” [Id. ¶ 106 n.17 (emphasis omitted).] Plaintiffs also argue that tender is not required when  
 2 the validity of the underlying debt is attacked. [Id.]

3 “A valid and viable tender of payment of the indebtedness owing is essential to an action to  
 4 cancel a voidable sale under a deed of trust.” Karlsen v. Am. Savings & Loan Assoc., 15 Cal.  
 5 App. 3d 112, 117 (1971). “[T]he tender rule is not absolute, and a tender may not be required  
 6 where it is inequitable to do so.” Sacchi v. Mortgage Elec. Registration Sys., Inc., 2011 WL  
 7 2533029, at \*10 (C.D. Cal. June 24, 2011) (citing Onofrio v. Rice, 55 Cal. App. 4th 413, 424  
 8 (1997)). “Also, if the action attacks the validity of the underlying debt, a tender is not required  
 9 since it would constitute an affirmation of the debt.” Onofrio, 55 Cal. App. 4th at 424; see also  
 10 Vogan, 2011WL 5826016, at \*7-\*8.

11 First, Plaintiffs have alleged actual tender in their FAC. [Doc. No. 3, FAC ¶ 106.]  
 12 Secondly, the tender requirement does not apply because Plaintiffs challenge “the beneficial  
 13 interest held by [Defendants] in the deed of trust, not the procedural sufficiency of the foreclosure  
 14 itself.” Vogan, 2011WL 5826016, at \*7-\*8; see also Johnson v. HSBC Bank USA, Nat. Ass’n,  
 15 2012 WL 928433, at \*3 (S.D. Cal. Mar. 19, 2012). Therefore, the Court declines to dismiss  
 16 Plaintiffs’ FAC on the basis of the tender rule.

### 17           C.     Plaintiffs’ Generalized Claims

18 Freddie Mac next argues that the following generalized claims made by Plaintiffs lack  
 19 merit: (1) Plaintiffs’ attack on MERS’s authority to foreclose; (2) Plaintiffs’ assumption that their  
 20 loan was securitized; and (3) Plaintiffs’ challenge of the assignment of the deed of trust. [Doc. No.  
 21 5-1, Def.’s Mot. at 12-14.]

#### 22           1.     MERS’s Authority to Foreclose

23 Freddie Mac argues that it is well-settled under California law that “a nominee beneficiary  
 24 such as MERS is duly authorized to foreclose under the deed of trust,” and that Plaintiffs thus  
 25 cannot challenge MERS’s authority to initiate foreclosure. [Doc. No. 5-1, Def.’s Mot. at 12.]  
 26 However, Plaintiffs do not challenge MERS’s authority to foreclose. In their FAC, Plaintiffs  
 27 merely argue that Defendants Freddie Mac and BANA had no right to conduct the foreclosure sale.  
 28 [Doc. No. 3, FAC ¶¶ 22, 41, 52, 61, 89.] Therefore, the Court rejects Freddie Mac’s argument.

## **2. Plaintiffs' Assumption that their Loan was Securitized**

2 Freddie Mac also argues that “even if Plaintiffs could demonstrate that their promissory  
3 note was the subject of securitization, that fact does not free them of the terms agreed upon in the  
4 Deed of Trust, or otherwise forgive Plaintiffs from their loan obligations.” [Doc. No. 5-1, Def.’s  
5 Mot., at 6.] Because Freddie Mac again does not explain why the entirety of Plaintiffs’ FAC  
6 should be dismissed on this ground, the Court declines to dismiss the entirety of Plaintiffs’ FAC.

### **3. Plaintiffs' Lack of Standing to Challenge the Assignment**

8 Freddie Mac then argues that Plaintiffs lack standing to challenge the assignment of the  
9 deed of trust to BANA. District courts have held that “borrowers who were not parties to the  
10 assignment of their deed—and whose rights were not affected by it—lacked standing to challenge  
11 the assignment’s validity because they had not alleged a ‘concrete and particularized injury that is  
12 fairly traceable to the challenged assignment.’” Silving v. Wells Fargo Bank, NA, 2012 WL  
13 135989, \*3 (D. Ariz. Jan. 18, 2012) (quoting In re MERS Litig., 2011 WL 4550189 (D. Ariz. Oct.  
14 3, 2011)).

15 Plaintiffs summarily allege that the “misrepresentations of [BANA] as agent for Freddie  
16 Mac damaged them” because they overpaid interest. [Doc. No. 3, FAC ¶ 40.] However, Plaintiffs  
17 do not explain how the assignment of the Deed of Trust caused them to overpay in interest.  
18 Further, even though Plaintiffs allege that they have been paying the wrong party, the Court finds  
19 persuasive the reasoning that “the validity of the assignment does not affect whether [the  
20 b]orrower owes its obligations, but only to whom [the b]orrower is obliged.” Livonia Prop.  
21 Holdings, L.L.C. v. Farmington Road Holdings, L.L.C., 717 F.Supp.2d 724, 735-36 (E.D. Mich.  
22 2010) (emphasis omitted). Regardless of which party held the Deed of Trust, Plaintiffs were still  
23 obligated to make payments. “[T]he only interest or right which an obligor of a claim has in the  
24 instrument of assignment is to insure him or herself that he or she will not have to pay the same  
25 claim twice.” Id. at 736 (internal quotation omitted). Plaintiffs have not alleged that they have  
26 had to pay their obligation twice.

27 Therefore, the Court finds that Plaintiffs lack standing to challenge the assignment of the  
28 Deed of Trust. Accordingly, the Court **DISMISSES** without prejudice Plaintiffs' first cause of

1 action for declaratory relief and eighth cause of action to quiet title because these claims require  
 2 Plaintiffs to be able to challenge the assignment of the Deed of Trust.

3           **D. Plaintiffs' Individual Causes of Action**

4           The Court now addresses Plaintiffs' remaining causes of action.<sup>2</sup>

5           **1. Third Cause of Action: Negligence**

6           The elements of a negligence claim are: (1) the defendant owed the plaintiff a duty of care;  
 7 (2) the defendant breached that duty; (3) the breach was the proximate or legal cause of the  
 8 resulting injury; and (4) the plaintiff was damaged. Ladd v. Cnty. of San Mateo, 12 Cal.4th 913,  
 9 917 (1996). Under California law, "as a general rule, a financial institution owes no duty of care  
 10 to a borrower when the institution's involvement in the loan transaction does not exceed the scope  
 11 of its conventional role as a mere lender of money." Nymark v. Heart Fed. Sav. & Loan Ass'n,  
 12 231 Cal.App.3d 1089, 1096 (1991). "In California, the test for determining whether a financial  
 13 institution owes a duty of care to a borrower-client 'involves the balancing of various factors,  
 14 among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the  
 15 foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the  
 16 closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral  
 17 blame attached to the defendant's conduct, and [6] the policy of preventing future harm.' Nymark,  
 18 231 Cal.App.3d at 1098 (quoting Connor v. Great Western Sav. & Loan Ass'n, 69 Cal.2d 850, 865  
 19 (1968)).

20           Plaintiffs' arguments regarding Freddie Mac's duty of care are muddled. In their FAC,  
 21 Plaintiffs state that Defendants have a duty to "follow California law with regard to enforcement of  
 22 monetary obligations, and to refrain from taking or failing to take action against Plaintiffs that they  
 23 did not have the legal authority to do." [Doc. No. 3, FAC ¶ 128.] Plaintiffs argue that Freddie  
 24 Mac owed to them a duty of care due to its "unconventional relationship" with Plaintiffs because it  
 25 was not receiving the benefits from Plaintiffs' Note and Mortgage. [Doc. No. 6, Pl.'s Opp. at 22.]  
 26 Plaintiffs then argue that Freddie Mac cannot "hide behind the protection" from the duty of care

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27           <sup>2</sup> The Court does not address Plaintiffs' second cause of action, which is only alleged against  
 28 Defendant APG Fund, because Defendant Freddie Mac does not address this cause of action in its  
 motion to dismiss. [Doc. No. 3, FAC at 37.]

1 afforded lenders because Freddie Mac did not loan money to Plaintiffs. [Id. at 23.]

2 The Court finds that Plaintiffs have not alleged facts sufficient to show that Freddie Mac  
 3 held itself out as the holder of Plaintiffs' Note. Although Plaintiffs allege facts that Freddie Mac  
 4 has taken various actions regarding the Property which are "related to Defendant Freddie Mac's  
 5 false claim of ownership of the Mortgage Note and Deed of Trust," Plaintiffs do not actually allege  
 6 that Freddie Mac held itself out as holder of the Note. Plaintiffs must provide more than mere  
 7 "labels and conclusions." See Twombly, 550 U.S. at 555. Therefore, even though the Court  
 8 accepts Plaintiffs' factual allegations as true, see Cahill, 80 F.3d at 337-38, their allegations are  
 9 insufficient to show that Freddie Mac held itself out as the holder of the Note.

10 Furthermore, even though Plaintiffs argue that they had an "unconventional relationship"  
 11 with Freddie Mac, this exception applies to the general principle that lenders do not owe a duty of  
 12 care to borrowers "where the lender plays its conventional role." See Johnson v. HSBC Bank  
 13 USA, Nat. Ass'n, 2012 WL 928433, at \*4 (S.D. Cal. Mar. 19, 2012); see also Taheny v. Wells  
 14 Fargo Bank, N.A., 2010 WL 5394315 (E.D. Cal. Dec. 22, 2010). However, Plaintiffs themselves  
 15 state that Freddie Mac was not a lender. [Doc. No. 6, Pl.'s Opp. at 23.] Thus, the Court finds that  
 16 Plaintiffs have not alleged facts sufficient to show a relationship between Freddie Mac and  
 17 Plaintiffs which gave rise to a duty of care. Therefore, the Court **GRANTS** Freddie Mac's motion  
 18 to dismiss the third cause of action, and **DISMISSES** without prejudice Plaintiffs' third cause of  
 19 action as to Defendant Freddie Mac.

20 **3. Fourth Cause of Action: Quasi-contract**

21 Plaintiffs seek to recover on a quasi-contract cause of action. Plaintiffs argue that "Freddie  
 22 Mac has been unjustly enriched by collecting monthly payments from Plaintiff [sic] when it had  
 23 and has no interest in their Note or Deed of Trust" and that they "seek[] restitution for any  
 24 payments made to Freddie Mac and BANA including those payments made to others acting in  
 25 concert with Freddie Mac for its benefit that were not actually paid to the lender or beneficiary, if  
 26 any." [Doc. No. 3, FAC ¶¶ 136-37.] Plaintiffs allege that Freddie Mac, "through its agents and  
 27 employees including [BANA], has undertaken multiple and ongoing overt acts to obtain moneys  
 28 and ultimately to attempt to transfer and sell title to Plaintiffs' property . . ." [Id. ¶ 89.]

1 Defendants summarily argue that because Plaintiffs do not adequately allege that Freddie  
 2 Mac was the holder of the Note or that it held itself out to be, Plaintiffs' cause of action for quasi-  
 3 contract should be dismissed. [Doc. No. 5-1, Def.'s Mot. at 17.] Defendants do not refute  
 4 Plaintiffs' contentions that Freddie Mac undertook actions to obtain money from Plaintiffs and that  
 5 it collected monthly payments from Plaintiffs.

6 Because the Court must take Plaintiffs' allegations as true, see Cahill, 80 F.3d at 337-38,  
 7 the Court **DENIES** Freddie Mac's motion to dismiss as to Plaintiffs' fourth cause of action and  
 8 finds that Plaintiffs have pleaded facts sufficient to survive a motion to dismiss as to this cause of  
 9 action.

10       **4. Fifth Cause of Action: Violation of 15 U.S.C. § 1692**

11       Plaintiffs contend that Defendants, including Freddie Mac "as the purported assignee,"  
 12 violated 15 U.S.C. § 1692, the Fair Debt Collection Practices Act (FDCPA) by, *inter alia*,  
 13 "[f]alsely represent[ing] the status of the debt, in particular, that it was due and owing to  
 14 Defendant Freddie Mac at the time the suit was filed" and "[f]alsely representing or implied [sic]  
 15 that the debt was owing to Defendant Freddie Mac as an innocent purchaser for value, when in  
 16 fact, such an assignment had not been accomplished" in their attempts to collect on the Note.  
 17 [Doc. No. 3, FAC ¶ 140.]

18       The FDCPA "generally prohibits 'debt collectors' from making false or misleading  
 19 representations and from engaging in various abusive and unfair practices in collecting debts.'" "  
 20 Klohs v. Wells Fargo Bank, N.A., 2012 WL 4758126 (D. Haw. Oct. 4, 2012) (citing Heintz v.  
 21 Jenkins, 514 U.S. 291, 292 (1995)). Thus, a defendant must be a "debt collector" within the  
 22 meaning of the FDCPA to be liable for its violation. Heintz, 514 U.S. at 294. The term "debt  
 23 collector" is defined as: "any person who uses any instrumentality of interstate commerce or the  
 24 mails in any business the principal purpose of which is the collection of any debts, or who  
 25 regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be  
 26 owed or due another." 15 U.S.C. § 1692a(6). Courts have found that a defendant is not a "debt  
 27 collector" within the meaning of the FDCPA when the plaintiff does not adequately allege that the  
 28 defendant was "(1) a person whose principal business is the collection of debts (whether on behalf

1 of himself or others); or (2) a person who regularly collects debts on behalf of others (whether or  
 2 not it is the principal purpose of his business).” Derusseau v. Bank of America, N.A., 2011 WL  
 3 5975821, at \*6 (S.D. Cal. Nov. 29, 2011) (quoting Izenburg v. ETS Servs., 589 F.Supp.2d 1193,  
 4 1999 (C.D. Cal. 2008) (internal quotation marks removed)).

5 Here, the Court finds that Plaintiffs have not alleged facts sufficient to show that Freddie  
 6 Mac is a debt collector within the meaning of the FDCPA. Therefore, the Court **GRANTS**  
 7 Freddie Mac’s motion as to Plaintiffs’ fifth cause of action and **DISMISSES** with prejudice  
 8 Plaintiffs’ fifth cause of action as to Defendant Freddie Mac.

9       **5. Sixth Cause of Action: Violation of California Business and Professions Code**  
 10      **§ 17200, et. seq.**

11      California Business and Professions Code § 17200, et. seq., also referred to as the unfair  
 12 competition law (“UCL”) “prohibits, and provides civil remedies for, unfair competition, which it  
 13 defines as ‘any unlawful, unfair or fraudulent business act or practice.’” Kwikset Corp. v. Superior  
 14 Court, 51 Cal.4th 310, 320 (2011) (quoting Cal. Bus. & Prof. Code § 17200). “Because the statute  
 15 is written in the disjunctive, it prohibits three separate types of unfair competition: (1) *unlawful*  
 16 acts or practices, (2) *unfair* acts or practices, and (3) *fraudulent* acts or practices. Quintero Family  
 17 Trust v. OneWest Bank, F.S.B., 2010 WL 2618729 (S.D. Cal. June 25, 2010) (citing Cel-Tech  
 18 Comm’ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 180 (1999)).

19      Private standing under the UCL is limited to “a person who has suffered injury in fact and  
 20 has lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204.  
 21 The intent of this section is to “confine standing to those actually injured by a defendant’s business  
 22 practices.” Kwikset Corp., 51 Cal.4th at 321.

23      Defendants argue that “Plaintiffs cannot maintain an action unless they establish a loss of  
 24 money or property that was caused by the Freddie Mac’s [sic] business practice” and that  
 25 “Plaintiffs have not identified any injury caused by Freddie Mac that would be sufficient to confer  
 26 standing under section 17200.” [Doc. No. 5-1, Def.’s Mot. at 18.]

27      Plaintiffs summarily allege that “[a]s a direct and proximate result of the actions of  
 28 [Freddie Mac], [BANA], and one or more of the of the DOE Defendants, . . . Plaintiff has [sic]  
 been injured in that a cloud has been placed upon title to Plaintiff’s [sic] Property and Defendants

1 have failed to remove this cloud from Plaintiff's [sic] title, and Plaintiffs have suffered and  
 2 continue to suffer pecuniary harm." [Doc. No. 3, FAC, ¶ 155.]

3       The Court finds that Plaintiffs have not adequately alleged facts to show that they were  
 4 harmed as a result of Freddie Mac's actions. Although Plaintiffs allege various actions that the  
 5 Defendants have taken, they do not allege what specific actions Freddie Mac took that place a  
 6 cloud on the title to the Property and that cause Plaintiffs pecuniary harm. Although Plaintiffs  
 7 state that BANA took various actions as an agent for Freddie Mac [Id. ¶¶ 40, 57, 59, 73, 89.],  
 8 Plaintiffs have not plead facts to support their legal conclusion that BANA acted as Freddie Mac's  
 9 agent. See E. & J. Gallo Winery v. EnCana Energy Servs., Inc., 2008 WL 2220396, at \*7 (E.D.  
 10 Cal. May 27, 2008) (quoting Restatement (Third) of Agency, § 1.02 (2005)) ("Whether a  
 11 relationship is one of agency is a legal conclusion made after an assessment of the facts of the  
 12 relationship and the application of the law of agency to those facts."); see also In re Toyota Motor  
 13 Corp., 785 F.Supp.2d 883, 911 (C.D. Cal. 2011) ("Plaintiffs may not rest on legal conclusions  
 14 regarding agency that are cast as factual allegations.").

15       Accordingly, the Court **GRANTS** Freddie Mac's motion to dismiss as to Plaintiffs' sixth  
 16 cause of action and **DISMISSES** without prejudice Plaintiffs' sixth cause of action as to  
 17 Defendant Freddie Mac.

#### 18       **6.      Seventh Cause of Action: Accounting**

19       "A cause of action for an accounting requires a showing that a relationship exists between  
 20 the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff  
 21 that can only be ascertained by an accounting." Tamburri v. Suntrust Mortg., Inc., 2011 WL  
 22 6294472, at \*17 (N.D. Cal. Dec. 15, 2011) (quoting Teselle v. McLoughlin, 173 Cal.App.4th 156,  
 23 179 (2009)).

24       Freddie Mac argues that "an Accounting is dependent upon whether there is a fiduciary  
 25 relationship between the parties," and that Plaintiffs cannot show that a fiduciary relationship  
 26 existed between Freddie Mac and Plaintiffs. [Doc. No. 5-1, Def.'s Mot. at 20-21.] However,  
 27 California courts have stated that "a fiduciary relationship between the parties is not required to  
 28 state a cause of action for accounting. All that is required is that some relationship exists that

1 requires an accounting.” Teselle, 173 Cal.App.4th at 716; see also Kritzer v. Lancaster, 96  
 2 Cal.App.2d 1, 7 (1950). “The right to an accounting can arise from the possession by the  
 3 defendant of money or property which, because of the defendant’s relationship with the plaintiff,  
 4 the defendant is obliged to surrender.” Teselle, 173 Cal.App.4th at 716.

5 Plaintiffs allege that Freddie Mac and BANA have “held themselves out to be Plaintiffs’  
 6 creditor and mortgage servicer,” and that “[a]s a result of this purported relationship with  
 7 Plaintiffs, said Defendants have a fiduciary duty to Plaintiff [sic] to properly account for payments  
 8 made by Plaintiffs.” [Doc. No. 3, FAC ¶ 158.] Plaintiffs also allege that they have “paid Freddie  
 9 Mac, [BANA], and other agents and employees of Freddie Mac[] mortgage payments for a period  
 10 of many years.” [Id. ¶ 159.] Plaintiffs also allege that since the money paid Freddie Mac was not  
 11 owed to it, these amounts “are due to be returned to the Plaintiffs in full.” [Id. ¶ 160.]

12 Even though the Court has found that Plaintiffs have not alleged facts sufficient to show  
 13 that Freddie Mac held itself out holder of the Note, the Court finds, taking Plaintiffs’ allegations as  
 14 true, see Cahill, 80 F.3d at 337-38, that Plaintiffs have alleged that Freddie Mac collected  
 15 mortgage payments from Plaintiffs. [Doc. No. 3, FAC ¶ 159.] The Court finds that Plaintiffs have  
 16 sufficiently pleaded that a relationship exists between Plaintiffs and Freddie Mac that requires an  
 17 accounting because Plaintiffs alleged Freddie Mac collected payments from Plaintiffs. Therefore,  
 18 the Court **DENIES** Freddie Mac’s motion to dismiss as to Plaintiffs’ seventh cause of action.

### 19 CONCLUSION

20 For the reasons above, the Court **GRANTS** in part and **DENIES** in part Defendant Freddie  
 21 Mac’s motion to dismiss. Specifically, the Court:

- 22       1.     **DISMISSES** without prejudice Plaintiffs’ first cause of action;
- 23       2.     **DISMISSES** without prejudice Plaintiffs’ third cause of action as to Defendant  
             Freddie Mac;
- 24       3.     **DENIES** the motion to dismiss as to Plaintiffs’ fourth cause of action;
- 25       4.     **DISMISSES** with prejudice Plaintiffs’ fifth cause of action as to Defendant Freddie  
             Mac;
- 26       5.     **DISMISSES** without prejudice Plaintiffs’ sixth cause of action as to Defendant

1 Freddie Mac;

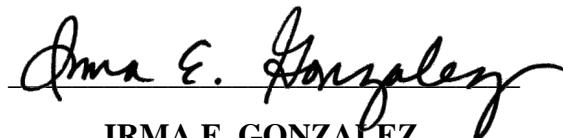
2 6. **DENIES** the motion to dismiss as to Plaintiffs' seventh cause of action;

3 7. **DISMISSES** without prejudice Plaintiffs' eighth cause of action.

4 Plaintiffs are **GRANTED** twenty-one (21) days from the date this Order is filed to file a Second  
5 Amended Complaint addressing the deficiencies of the pleading set forth above.

6 **IT IS SO ORDERED.**

7 **DATED:** December 6, 2012



8 IRMA E. GONZALEZ  
9 United States District Judge

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